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The Duty to Consult Indigenous Peoples

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The Duty to Consult Indigenous Peoples
(Background Paper)

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THE DUTY TO CONSULT INDIGENOUS PEOPLES

1 INTRODUCTION

First Nations, Inuit and Métis peoples in Canada¹ have unique rights that are guaranteed under section 35 of the *Constitution Act, 1982*. Section 35 recognizes and affirms the existing Aboriginal and treaty rights of Indigenous peoples.² As a way to protect these rights, the doctrine of the duty to consult and, where appropriate, accommodate Indigenous groups, was developed by Canadian courts. Furthermore, the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in 2010, provides that member states must consult and cooperate with Indigenous peoples on certain matters, such as “legislative or administrative measures that may affect them,” in order to obtain their free, prior and informed consent.³

As stated by the Supreme Court of Canada (Supreme Court), the general purpose of the duty to consult is to foster reconciliation.⁴ Thus, the duty to consult doctrine is of fundamental importance to Indigenous communities and Indigenous governments, as well as to federal, provincial and territorial governments, private industry stakeholders and Canadian society as a whole.

This paper examines the origins and evolution through the courts of the duty to consult. It first provides background information on the duty to consult. It then discusses, at a more practical level, who is involved in consultations, how and when the duty is engaged, the scope and requirements of consultation and accommodation and the circumstances in which consent is required. It further examines whether the duty to consult applies in the context of legislative processes. It concludes by providing information on guidelines that have been developed and updated by Indigenous communities and organizations and federal/provincial governments in response to emerging case law and that inform the implementation of the duty to consult.

2 OVERVIEW

The duty to consult and, where appropriate, accommodate Indigenous peoples, requires that federal and provincial governments have a dialogue with Indigenous groups about contemplated government actions or decisions that might have a negative impact on Aboriginal and treaty rights.⁵ The goal is to listen to the views and concerns of affected Indigenous groups and, where necessary and possible, modify the action or decision to avoid unlawful infringement of those rights.⁶

Examples of government actions or decisions that may engage the duty to consult include the issuance of permits, licences and regulatory project approvals.⁷ More specifically, the duty to consult may arise in the context of environmental assessments, regulatory processes and natural resources; examples include a decision regarding a pipeline that may affect Indigenous groups’ access to and supply of an animal population, or a change in policy or regulation that restricts land use.

Historically, the federal and provincial/territorial governments did not routinely consider the impacts of certain actions or decisions on Indigenous communities. As a result, the duty to consult can be viewed as a response to imbalances of power between governments and First Nations, Inuit and Métis peoples in Canada.⁸

2.1 SUPREME COURT TRILOGY

In case law from the 1980s and 1990s on section 35 Aboriginal rights, courts recognized consultation as being part of the fiduciary duty of the Crown.⁹ For example, in 1990, the duty to consult as a potential protective measure was mentioned in *R. v. Sparrow*. In that case, the Supreme Court declared that whether an Indigenous group has been consulted with respect to an implemented measure is one factor to consider in assessing if an infringement on an Aboriginal or treaty right is justified.¹⁰

However, it was not until the 2000s that the fundamental notion of the duty to consult, as we know it today, was set out. In 2004 and 2005, the Supreme Court released a trilogy of decisions consisting of *Haida Nation v. British Columbia (Minister of Forests) (Haida Nation)*; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*;¹¹ and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. These three cases established certain procedural protections for Aboriginal and treaty rights. They also clarified the basis for the Crown's duty to consult and outlined a general framework for its implementation. The landmark case of the trilogy is the unanimous judgment in *Haida Nation*, in which the Supreme Court established that the Crown has a duty to consult Indigenous peoples when it intends to act in a manner that may adversely affect potential or established Aboriginal or treaty rights.

Prior to the trilogy, consultation considerations were limited to cases of infringement on established section 35 rights.¹² Moreover, the onus was on Indigenous groups to first prove the existence of rights and their infringement. Often, Indigenous claimants had to commence legal action and seek an injunction as a temporary remedy while matters were litigated. Injunctions were often difficult to obtain and the legal procedures lengthy.¹³ In the case of negotiations to establish those rights, the process could take many years.

2.2 LEGAL AND CONSTITUTIONAL REQUIREMENTS, INCLUDING “HONOUR OF THE CROWN”

While the duty to consult is not expressly set out in constitutional documents or in legislation, it is nonetheless a constitutional requirement. It finds its source in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples. The duty, which cannot be removed or restricted by legislation, is a common law requirement grounded in the honour of the Crown and enshrined in section 35 of the *Constitution Act, 1982*.¹⁴

2.2.1 SECTION 35 OF THE *CONSTITUTION ACT, 1982*

All Canadian laws must comply with the constitutional laws for them to be valid and enforceable. In the case of laws that may have an impact on Aboriginal and treaty rights, section 35(1) of the *Constitution Act, 1982* recognizes and affirms the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”

Over the years, the Supreme Court has interpreted section 35 rights as a means of advancing reconciliation. It has also recognized the importance of consultation in the protection of those rights. In that regard, the Supreme Court articulated: “[r]ather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests.”¹⁵ The duty must also be interpreted within a larger context of the Crown’s obligations toward the Indigenous peoples in Canada.¹⁶ In *Tsilhqot’in Nation v. British Columbia (Tsilhqot’in Nation)*, the Supreme Court affirmed that section 35 and the limits it imposes on governments “protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.”¹⁷

2.2.2 “HONOUR OF THE CROWN”

The honour of the Crown¹⁸ is a constitutional principle that arises from “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”¹⁹ The honour of the Crown is not a new concept in Aboriginal law; for instance, in 1895, the Supreme Court explained that the honour of the Crown is “faithfully fulfilled as a treaty obligation of the Crown.”²⁰

The honour of the Crown, along with the goal of reconciliation, is central to the Crown’s relationship with Indigenous peoples, and may require it to consult Indigenous groups and, where appropriate, accommodate their interests. It requires that the Crown act in good faith and honourably in all of its dealings with Indigenous peoples, “from the assertion of sovereignty to the resolution of claims and the implementation of treaties.”²¹ The Supreme Court has stated that the “honour of the Crown is always at stake in its dealings with Aboriginal peoples,” and that “the Crown must act with honour and integrity, avoiding even the appearance of ‘sharp dealing.’”²²

3 DUTY TO CONSULT: KEY CONSIDERATIONS

3.1 WITH WHOM DOES THE DUTY TO CONSULT REST?

The duty to consult is owed to First Nations, Inuit and Métis communities whose potential or established rights may be affected by contemplated Crown conduct. While an Indigenous group can designate an individual to represent it in consultations, individuals are generally not entitled to be consulted separately. That distinction was elaborated upon in *Beckman v. Little Salmon/Carmacks First Nation (Little Salmon/Carmacks)*, where the Supreme Court determined that an individual member of Little Salmon/Carmacks First Nation “was not, as an individual, a necessary party to the

consultation,” although that individual benefited from the collective interest of the First Nation.²³

The duty to consult Indigenous peoples rests with the Crown, which is the executive branch of both federal and provincial governments.²⁴ Crown corporations may also have a duty to consult.²⁵ While the Supreme Court held in *Little Salmon/Carmacks* that the Crown “cannot contract out of its duty of honourable dealing with Aboriginal people,” the legislature may delegate aspects of consultations to an authorized administrative tribunal or statutory body with the requisite authority. Whether an administrative tribunal or a statutory body has the requisite authority depends on the law that confers its powers and duties.²⁶ For instance, consultations can be carried out within a regulatory process (such as an environmental assessment) by a regulatory body (e.g., the National Energy Board). The Crown can rely on such processes to fulfill its duty, partially or completely.²⁷

While project proponents seeking a particular development are considered third parties to consultations and do not have a legal obligation to consult Indigenous groups, the Crown may delegate certain procedural aspects of the consultation process to them.²⁸ If the Crown intends to rely on the regulatory process of a regulatory body or on a proponent’s engagement with Indigenous groups, this intention must be clearly communicated to the affected Indigenous groups.²⁹ The Crown “always holds ultimate responsibility for ensuring consultation is adequate.”³⁰

3.2 WHEN IS THE DUTY TO CONSULT ENGAGED?

Generally, the duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it.”³¹

The language used by the Supreme Court suggests that the duty to consult can be easily triggered: The duty may arise not only with respect to established rights, but also where rights are claimed and have not yet been settled by negotiation or upheld by the courts. The Supreme Court explained in *Haida Nation* that limiting the duty to consult to “the post-proof sphere” could limit reconciliation and could, for example, place traditional land at risk pending the resolution of a claim.³²

The reasons provided by the Supreme Court also imply a proactive duty on the part of the Crown to engage with affected Indigenous groups before making a decision that could have negative effects on established or claimed Aboriginal rights or title.

In *Rio Tinto Alcan v. Carrier Sekani Tribal Council (Carrier Sekani)*, the Supreme Court clarified when the duty to consult is triggered, as set out in *Haida Nation*, and provided a three-element test:

- First, the Crown must have “knowledge, actual or constructive, of a potential Aboriginal claim or right.”
- Second, the Crown must be contemplating a certain conduct that may engage a potential Aboriginal right.

- Third, the Crown's decision or action must have the potential to adversely affect an Aboriginal claim or right.³³

The Supreme Court confirmed in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* that the duty to consult is not triggered by historical impacts and is not meant to address past grievances, but rather is designed to address potential impacts flowing from a current proposed project.³⁴

3.3 WHAT IS THE SCOPE OF THE DUTY TO CONSULT?

Once the existence of the duty to consult is established, its content must be evaluated, and the level of consultation required must be determined. As each case is evaluated on its own merits and is highly context-specific, the scope of the required consultations can vary significantly.

With this in mind, the Supreme Court has set out a “spectrum” of obligations that guide consultation requirements. Certain factors must be considered in determining the level of consultation required: the strength of the claim, the nature of the right and the severity of the potential harm of a Crown decision or action on the Aboriginal or treaty right.

Weaker claims, where the right may be considered limited and the infringement minor, are situated at the lower end of the spectrum. These claims merely require the Crown to give notice to the parties, disclose information and discuss issues raised as a response to the notice.³⁵ Cases that have a strong, established case for the claim and where the potential infringement is severe, such as where the risk for non-compensable damage is high, are at the higher end of the spectrum and require deeper consultation. Deeper consultation may include the opportunity to make submissions. It may also entail formal participation in the decision-making process and may justify the provision of written reasons to demonstrate that Indigenous concerns were considered.³⁶ It could even require securing the full consent of the Indigenous group affected prior to the Crown deciding.³⁷

Since the trilogy of decisions handed down in 2004 and 2005, Canadian courts – including the Supreme Court – have applied the duty to consult doctrine into their decisions and, in so doing, have refined the requirements for meaningful consultation and accommodation in various circumstances. In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (Clyde River)*, the Supreme Court clarified what constitutes “deep consultation.” While reiterating the requirements established in *Haida Nation*, the Supreme Court, in *Clyde River*, explained that in some cases, it may be necessary to provide funding to enable Indigenous rights-holders to participate in the process (for example, funding to support the submission of scientific evidence) and to ensure that the affected Indigenous groups receive adequate responses to their questions.

Regardless of the strength of the Aboriginal interests or rights, or the severity of the potential infringement of those interests or rights by a government decision or action, consultations must always be carried out in good faith, “with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at

issue.”³⁸ Since circumstances may change and new information may come to light in the course of the process, consultations must also be approached with flexibility.³⁹

The duty to consult and, where appropriate, accommodate does not dictate a particular outcome and the Crown is not held to a level of perfection in fulfilling its duty: “[s]o long as every reasonable effort is made to inform and to consult, such efforts would suffice.”⁴⁰ However, it is worth noting that in some cases, the absence of certain procedural requirements, such as the lack of oral hearings and participant funding, may “significantly [impair] the quality of consultation”⁴¹ and result in a breach of the Crown’s duty.

3.4 WHAT HAPPENS WHEN THE CROWN FAILS TO FULFILL ITS DUTY TO CONSULT?

As is the case with determining the scope of the duty to consult, court orders to remedy a failure to meet the duty to consult vary significantly according to the situation. Various forms of relief are available when the Crown fails to meet its duty to consult, ranging from injunctions (prohibiting an action from moving any further), to damages (monetary compensation), to an order to carry out the consultation (or to engage in deeper consultations).⁴²

When appropriate, a court may grant a declaration that the Crown has not fulfilled its duty to consult a particular Indigenous community within a particular context. Additionally, a court may order the Crown to engage in consultations (or in further consultations) with a particular Indigenous community and may prescribe specific requirements to be met within that consultation process.⁴³

In its decision in *Clyde River*, the Supreme Court held that since “the duty to consult must be fulfilled prior to the action that could adversely affect the right in question,” courts will often quash government decisions made without adequate consultation.⁴⁴ The Supreme Court, however, cautioned that “judicial review is no substitute for adequate consultation,” and that adequate consultation must be achieved prior to making a decision rather than “after-the-fact judicial remonstrance following an adversarial process.”⁴⁵

3.5 WHAT IS THE DUTY TO ACCOMMODATE?

Good faith consultation may also involve accommodating the concerns of the Indigenous groups affected by Crown action pending final resolution of a claim. Forms of accommodation may include changing a development project’s scope, location or timing. It may also involve changes to Crown policy proposals. In that regard, finding interim solutions within the consultation process may prevent irreparable harm or minimize the effect of infringement.⁴⁶ The Supreme Court has also stated that, at the accommodation stage, the rights of the Indigenous groups must be balanced with other societal interests.⁴⁷ As with the duty to consult, the duty to accommodate the interests of Indigenous peoples is grounded in the honour of the Crown and cannot be delegated.⁴⁸

The degree of accommodation required, just like the scope of consultation, will vary depending on the circumstances of each case, and consultation may not always lead to accommodation.⁴⁹ Where there is a strong *prima facie* claim and severe potential infringement, adequate consultations may require accommodations.

For example, in *Haida Nation*, the British Columbia government replaced a tree farm licence and approved its transfer from one forestry corporation to another on the lands of the islands of Haida Gwaii (formerly the Queen Charlotte Islands), which were subject to a claim to Aboriginal title. Despite the claim, the provincial Crown had not consulted the Haida prior to replacing and transferring the licence. Finding that the Haida had a strong claim to title to Haida Gwaii, which stood to be severely affected by the granting of the licence, the Supreme Court concluded that the provincial Crown had breached its duties, was required to consult the Haida regarding the proposed licences and had to consider accommodating their concerns.

3.6 IS CONSENT REQUIRED?

The Supreme Court has specified that the duty to consult and, where appropriate, accommodate does not give Indigenous groups a veto over final Crown decisions.⁵⁰ However, in some cases, the consent of Indigenous groups may be required on certain government actions or decisions. For instance, consent may be required for implementing provincial fishing and hunting regulations on traditional lands⁵¹ or when the Crown seeks to use the land where Aboriginal title has been established.⁵² In such cases, if consent is not given, the only recourse for the Crown is to prove that the infringement of the right is justified.⁵³

As for Aboriginal title that is claimed but not yet proven, the courts have not indicated whether consent is required, though consultation may nonetheless be necessary, and the level of obligation would fall along the spectrum as established in *Haida Nation*. Moreover, in *Tsilhqot'in Nation*, the Supreme Court noted that “[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”⁵⁴

3.7 IS THERE A DUTY TO CONSULT IN THE LEGISLATIVE PROCESS?

As explained above, the duty to consult may arise from actions of the executive branch of government. The question of whether legislative action (parliamentary process) triggers the duty to consult is one that was left open in 2010 by the Supreme Court in *Carrier Sekani*.

However, on 11 October 2018, the Supreme Court revisited the matter in *Mikisew Cree First Nation v. Canada (Governor General in Council)*,⁵⁵ in which the Court considered the appeal by the Mikisew Cree First Nation of a 2016 decision of the Federal Court of Appeal.⁵⁶ The questions addressed by the Federal Court of Appeal were as follows: Did the Crown have a duty to consult prior to passing omnibus bills amending several environmental statutes and, if so, had the Crown breached its duty in that case? The Mikisew had sought judicial review over the development and

introduction of the legislation, arguing that the Crown has a duty to consult in the development of legislation that has the potential to adversely affect their treaty rights to hunt, trap and fish under Treaty No. 8.

The Federal Court of Appeal held that the Federal Court did not have jurisdiction to hear the Mikisew's application since the source of power exercised by the ministers in introducing the omnibus bill was legislative in nature and that judicial review was not a proper subject for legislative action. It also stated that importing the duty to consult into the legislative process "offends the separation of powers doctrine and the principle of parliamentary privilege."⁵⁷

The Supreme Court unanimously rejected the appeal on the basis that the Federal Court lacked the jurisdiction to review the matter (which engages the development of bills by federal ministers). However, the Supreme Court was divided on the following questions:

- whether the legislative process is subject to the duty to consult and accommodate Indigenous peoples; and
- whether the honour of the Crown applies to the legislative process.

On the first question, a seven-to-two majority determined that the duty to consult and accommodate Indigenous peoples does not apply to the law-making process as it would constitute inappropriate interference with parliamentary activities, in violation of the constitutional principles of the separation of powers and parliamentary sovereignty.⁵⁸ Two justices (Abella and Martin) opined that the duty to consult "attaches to all exercises of Crown power, including legislative action."⁵⁹

On the second question, whether the honour of the Crown extends to the legislative process (in other words, whether Parliament is required to uphold the honour of the Crown), the justices were also divided. A five-to-four majority held that the principle of the honour of the Crown applies to both branches of government (the executive and Parliament). In their reasons, the justices elaborated as follows:

- Justices Abella and Martin stated that the honour of the Crown exists in the exercise of both legislative and executive authority, and that the "honour of the Crown cannot be undermined, let alone extinguished, by the legislature's assertion of parliamentary sovereignty."⁶⁰
- Chief Justice Wagner and Justices Karakatsanis and Gascon were also of the view that the honour of the Crown applies to both the executive and Parliament, but "the duty to consult is not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights may be adversely affected by legislation." They suggested that new approaches could be developed to protect section 35 rights and uphold the honour of the Crown.⁶¹
- Justices Brown, Moldaver, Côté and Rowe affirmed that the honour of the Crown does not extend to the law-making process. They opined that the honour of the Crown attaches to Crown conduct (which holds executive functions), and that legislative action, not being executive conduct, is not bound by the honour of the Crown.⁶²

This decision makes plain that, at present, the duty to consult applies to Crown conduct under enacted legislation, but not to the process of developing legislation. The different sets of reasons provided by the Supreme Court, however, may create legal uncertainty as to whether the honour of the Crown extends to the legislative process and whether consultation and accommodation are the appropriate means to give effect to the honour of the Crown. Moving forward, the Supreme Court may eventually provide clarity on the matter in future challenges.

It should be noted that in the context of developing and enacting legislation, consultation with Indigenous groups may still be undertaken beyond what is required under the legal duty to consult: for instance, federal, provincial and territorial governments may seek as a matter of policy Indigenous groups' input, such as through public consultations that include Indigenous participation.

4 CONSULTATION POLICIES AND GUIDELINES

Federal, provincial and territorial governments have established consultation policies to guide the application of the duty to consult within their areas of jurisdiction where Aboriginal or treaty rights are potentially engaged. In an effort to ensure compliance with the duty as articulated in *Haida Nation*, federal and provincial governments released interim policy documents. Since then, new and updated policies have been released following major developments in the case law, and all Canadian provinces and territories have now adopted a Cabinet-approved policy or guideline on the duty to consult.

In 2008, the federal government released interim guidelines on consultation, which provided direction to federal departments and agencies on how to prepare for meaningful consultations with Indigenous peoples. Following engagement with representatives of Indigenous groups, provincial/territorial governments and industry representatives, these guidelines were updated in 2011 to reflect the evolving case law on the duty to consult. The new federal guidelines include additional guiding principles and provide more detailed directives on consultation and accommodation.⁶³ These guidelines, however, have not been updated since then. In 2016, Bryn Gray, Ministerial Special Representative to the Minister of Aboriginal Affairs and Northern Development Canada, submitted a report that included recommendations on how to improve the federal government's approach to consultation and accommodation. Among other things, he called on the Government of Canada to increase transparency and improve consultation on policy, regulatory and legislative changes, as well as to enhance the capacity of Indigenous groups throughout the consultation process.⁶⁴

In parallel, federal departments and agencies have developed their own consultation guidelines applicable in specific areas. The Canadian Environmental Assessment Agency, for example, has adopted an approach to consultations with Indigenous peoples as part of environmental assessment processes and decision-making.⁶⁵

Indigenous organizations and specific Indigenous communities have also developed their own consultation policies, guidelines and protocols.⁶⁶ For instance, in September 2018, the Mississaugas of the New Credit First Nation signed a consultation protocol with the Government of Canada. The protocol establishes a

process for Canada to fulfill its duty to consult and sets out the parties' respective obligations.⁶⁷

5 CONCLUSION

The duty to consult Indigenous peoples on Crown conduct that may affect them is essential in protecting and promoting Aboriginal and treaty rights as recognized and affirmed in the Constitution. In its current form, the duty to consult and accommodate aims to provide certainty through a legal framework for effective and adequate consultations.

However, the Crown's legal duty to consult and, where appropriate, accommodate Indigenous peoples, in addition to being highly context-specific, can raise complex questions. Issues related to the duty come before Canadian courts regularly. While the main parameters of the duty to consult doctrine have largely been consistent throughout the Canadian case law, its requirements are evolving, and matters related to the duty are likely to continue to be raised both at the political and judicial levels. Further court decisions on the parameters of the duty to consult and accommodate are expected to emerge, which should provide further clarity on its legal and constitutional nature, scope and requirements.

NOTES

1. Section 35(2) of the *Constitution Act, 1982* refers to "Indian, Inuit and Métis peoples" collectively as the "[A]boriginal peoples of Canada." Reflecting changes in terminology over recent decades, throughout this paper, the term "Indigenous peoples" is used in relation to First Nations, Inuit and Métis peoples, while the term "Aboriginal" refers to the rights recognized and affirmed by section 35. See "[Rights of the Aboriginal Peoples of Canada](#)," Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.
2. Aboriginal rights flow from the practices, traditions and customs of Aboriginal societies that existed prior to European contact, whereas treaty rights are specific and may be exercised only by the Indigenous groups that are signatories to treaties. See sections 35(1) and 35(3) of the *Constitution Act, 1982*. Treaties between Indigenous peoples and Canada include historic treaties (signed between 1701 and 1923) and modern treaties, made following comprehensive land claims settlements. The *Constitution Act, 1982* recognizes and affirms treaty rights that were already in existence in 1982 and those that came after. See Government of Canada, [Treaties and agreements](#); [Mikisew Cree First Nation v. Canada \(Minister of Canadian Heritage\)](#), 2005 SCC 69, paras. 3–4; and [Beckman v. Little Salmon/Carmacks First Nation](#), 2010 SCC 53.
3. United Nations, [United Nations Declaration on the Rights of Indigenous Peoples](#), UN Doc. A/RES/61/295, 13 September 2007, art. 19.
4. See, for example, [Haida Nation v. British Columbia \(Minister of Forests\)](#), 2004 SCC 73, para. 32.
5. *Ibid.*, para. 35.
6. See, for example, [Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council](#), 2010 SCC 43.
7. Government of Canada, "[About the duty to consult](#)," *Government of Canada and the duty to consult*.

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8. Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, Purich Publishing Limited, Saskatoon, 2014, p. 15.
9. See, for example, [Guerin v. The Queen](#), [1984] 2 SCR 335; [R v. Sparrow](#), [1990] 1 SCR 1075; and [Delgamuukw v. British Columbia](#), [1997] 3 SCR 1010.

The fiduciary duty to Indigenous peoples “requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.” See *Haida Nation v. British Columbia (Minister of Forests)*, para. 18. The case law surrounding the fiduciary duty of the Crown to Indigenous peoples was developed in five main cases: [Calder et al. v. Attorney-General of British Columbia](#), [1973] SCR 313; *Guerin v. The Queen*; *R v. Sparrow*; *Haida Nation v. British Columbia (Minister of Forests)*; and [Tsilhqot’in Nation v. British Columbia](#), 2014 SCC 44.
10. The government may justifiably deny or infringe upon Aboriginal and treaty rights. A two-fold test to determine if an infringement is justified was set out by the Supreme Court of Canada [Supreme Court] in *R v. Sparrow*: The government must prove that the infringement serves a valid legislative objective. If a valid objective exists, the government must demonstrate that the infringement occurred in a way that was in keeping with the honour of the Crown.
11. [Taku River Tlingit First Nation v. British Columbia \(Project Assessment Director\)](#), 2004 SCC 74.
12. See *R v. Sparrow*.
13. See *Haida Nation v. British Columbia (Minister of Forests)*.
14. *Ibid.*; [R. v. Kapp](#), 2008 SCC 41; and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*. In paragraph 61 of its decision in *Little Salmon/Carmacks First Nation* – the Supreme Court’s first judgment on the duty to consult within the context of a modern treaty agreement – the Court held that while “[c]onsultation can be shaped by agreement of the parties, ... the Crown cannot contract out of its duty of honourable dealing with Aboriginal people.”
15. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, para. 34.
16. [Manitoba Metis Federation Inc. v. Canada \(Attorney General\)](#), 2013 SCC 14, para. 76.
17. *Tsilhqot’in Nation v. British Columbia*, para. 139.
18. *Haida Nation v. British Columbia (Minister of Forests)*, paras. 16–17.
19. *Ibid.*, para. 32.
20. [Province of Ontario v. The Dominion of Canada and Province of Quebec. In re Indian Claims](#), (1895) 25 SCR 434.
21. *Haida Nation v. British Columbia (Minister of Forests)*, para. 17.
22. *Ibid.*, paras. 16 and 19. See also [R. v. Badger](#), [1996] 1 SCR 771, para. 41; and *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, paras. 68–72. In paragraphs 74 and 75 of *Manitoba Metis Federation*, the Supreme Court stated that the duty that arises from the honour of the Crown will “vary with the circumstances” in which it is engaged, but it nonetheless requires the Crown to “(1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it.”
23. *Beckman v. Little Salmon/Carmacks First Nation*, para. 35. Although individuals are generally not entitled to the duty to consult, the Supreme Court in *Behn v. Moulton Contracting Ltd.* held that some rights may have both collective and individual aspects:

Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.

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- See [Behn v. Moulton Contracting Ltd.](#), 2013 SCC 26, para. 33.
24. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 9.
 25. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, para. 81.
 26. *Ibid.*, paras. 56, 60 and 74.
 27. [Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.](#), 2017 SCC 41, para. 5; and [Clyde River \(Hamlet\) v. Petroleum Geo-Services Inc.](#), 2017 SCC 40, paras. 1 and 22.
 28. *Haida Nation v. British Columbia (Minister of Forests)*, para. 53.
 29. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, para. 44.
 30. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, para. 22.
 31. *Haida Nation v. British Columbia (Minister of Forests)*, para. 35.
 32. *Ibid.*, para. 33.
 33. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, para. 31.
 34. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, para. 41.
 35. *Haida Nation v. British Columbia (Minister of Forests)*, para. 43.
 36. *Ibid.*, para. 44.
 37. *Delgamuukw v. British Columbia*, para. 168.
 38. *Ibid.*
 39. *Haida Nation v. British Columbia (Minister of Forests)*, para. 45.
 40. *Ibid.*, para. 62, citing [R. v. Nikal](#), [1996] 1 SCR 1013, para. CX [110].
 41. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, para. 49.
 42. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, para. 37; and *Tsilhqot'in Nation v. British Columbia*, para. 89.
 43. See *Haida Nation v. British Columbia (Minister of Forests)*; [Hupacasath First Nation v. British Columbia \(Minister of Forests\) et al.](#), 2005 BCSC 1712; and [Ke-Kin-Is-Uqs v. British Columbia \(Minister of Forests\)](#), 2008 BCSC 1505. In *Hupacasath* and *Ke-Kin-Is-Uqs*, the British Columbia Supreme Court ordered the parties to exchange their positions and the information necessary for carrying out and completing consultations. In *Ke-Kin-Is-Uqs*, the Court ordered the appointment of a mediator at the Crown's expense to direct certain aspects of the consultation process.
 44. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, paras. 39 and 53.
 45. *Ibid.*, para. 24.
 46. *Haida Nation v. British Columbia (Minister of Forests)*, para. 47.
 47. *Ibid.*, para. 50; and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, para. 59.
 48. *Haida Nation v. British Columbia (Minister of Forests)*, paras. 10 and 53.
 49. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, para. 66,
 50. *Haida Nation v. British Columbia (Minister of Forests)*, para. 48; and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, para. 59.
 51. *Delgamuukw v. British Columbia*, para. 168.
 52. *Tsilhqot'in Nation v. British Columbia*, para. 76.

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53. *R v. Sparrow*, pp. 1113–1114.
54. *Tsilhqot'in Nation v. British Columbia*, para. 97.
55. [Mikisew Cree First Nation v. Canada \(Governor General in Council\)](#), 2018 SCC 40.
56. [Canada \(Governor General in Council\) v. Mikisew Cree First Nation](#), 2016 FCA 311 (CanLII).
57. *Ibid.*, para. 3. In a concurring judgment, Justice Pelletier of the Federal Court of Appeal determined that the duty to consult was not triggered by laws of general application (as was the case here). He noted that “[t]he duty must be found in the decisions by which such legislation is operationalized” (para. 97), and suggested that it may be possible for the duty to be triggered when proposed legislation could affect the interests of a particular First Nation in a particular territory.
58. The separation of powers mandates that each branch of government (legislative, executive and judicial) can fulfill its duties independently from one another. For instance, it ensures that the executive branch of the government may not interfere with the independence of the judiciary, or that courts may not “trespass onto the legislature’s domain.” As for parliamentary sovereignty, it dictates that “the legislature can make or unmake any law it wishes,” within the confines of its constitutional authority. See *Mikisew Cree First Nation v. Canada (Governor General in Council)* [2018], paras. 35 and 36.
59. *Ibid.*, para. 75.
60. *Ibid.*, paras. 55–56.
61. *Ibid.*, para. 45.
62. *Ibid.*, para. 135.
63. Indigenous and Northern Affairs Canada, [Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011](#).
64. Bryn Gray, [Building Relationships and Advancing Reconciliation through Meaningful Consultation](#), Report to the Minister of Indigenous and Northern Affairs, 30 May 2016.
65. Canadian Environmental Assessment Agency, [Aboriginal Consultation in Federal Environmental Assessment](#).
66. See, for example, Federation of Sovereign Indigenous Nations [formerly Federation of Saskatchewan Indian Nations], [Federation of Saskatchewan Indian Nations: Consultation Policy](#).
67. Crown-Indigenous Relations and Northern Affairs Canada, [“Canada and the Mississaugas of the New Credit First Nation forge new relationship with signing of consultation protocol,”](#) News release, 6 September 2018.